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No. 06-1111

In the Supreme Court of the United States

PETER BROOKS, DAVID T. GIES, PATRICIA CLEMMER PETERS, ROBIN B. HEATWOLE, DRY COMAL CREEK VINEYARDS, HOOD RIVER VINEYARDS, AND SCHNEIDER LIQUOR COMPANY, INC.,
Petitioners,

v.

ESTHER H. VASSAR, PAMELA O'BERRY EVANS, AND SUSAN R. SWECKER, all in their official capacities as members of the Virginia Alcoholic Beverage Control Board; AND VIRGINIA WINE WHOLESALERS ASS'N, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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A. The Personal Import Limitation Facially Discriminates Against Interstate Commerce And Cannot Be Reconciled With *Granholm*

The briefs in opposition confirm the significance of the issues here. Respondents *acknowledge* that the Virginia personal import limit discriminates against out-of-state retailers and directly impedes the flow of commerce across state lines. Virginia Opp. 2-3; Virginia Wine Wholesalers Association ("VWWA") Opp. 11 ("[T]here can be no question that the[] [Virginia] system do[es] not accord out-of-state retailers and in-state retailers * * * equal access to in-state markets for alcohol products."). And they make *no* attempt to identify a legitimate state interest served by this discrimination, let alone one that could not be advanced by less discriminatory alternatives. Such a state regime ordinarily is *per se* unconstitutional. The question here is whether discrimination of this sort – which furthers no state interest other than economic protectionism – is saved by the Twenty-First Amendment.

1. Respondents contend principally that Virginia's discrimination against out-of-state retailers is validated by *Granholm*, a proposition that they find supported by the *Granholm dissent*. Virginia Opp. 12; VWWA Opp. 12 n.9. But *Granholm* does no such thing. The Court there held unambiguously that the Twenty-First Amendment "did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." 544 U.S. at 484-85. The Court also broadly affirmed that the virtually *per se* invalidation of facially discriminatory laws "applies to state regulation of alcohol." *Id.* at 486. And it repeatedly stated this principle in general terms that appear to reach discrimination regarding alcohol bought at retail, emphasizing that the Amendment and its statutory predecessors "'do[] not show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor *brought into one state from another*.'" *Id.* at 484-85 (citation omitted)

(emphasis added). See, *e.g.*, *id.* at 487 ("[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."); *ibid.* ("The central purpose of the [Amendment] was not to empower States to favor local liquor *industries* by erecting barriers to competition" (emphasis added) (internal quotation omitted)).

Moreover, respondents' understanding is wholly at odds with the history and purposes of the Twenty-First Amendment, which were the underpinning for the holding in *Granholm*. As the petition demonstrates (at 13-16), the clear, overriding purpose of Section 2 of the Amendment was to allow "dry" states to remain dry. See, *e.g.*, 76 Cong. Rec. 4141 (1933) (statement of Sen. Blaine) ("[T]o assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line."). Nothing in the Amendment's history suggests that it gave "wet" states the power to discriminate against out-of-state retailers.[1] Respondents make no response at all to that history.[2]

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[1] Virginia gets no further in its contention (at Opp. 17-18) that the Wilson and Webb-Kenyon Acts authorize its discriminatory system. *Granholm* explicitly held that "[t]he Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state." 544 U.S. at 483. Moreover, as the petition demonstrates (at 14), the Twenty-First Amendment was intended to constitutionalize Webb-Kenyon. It thus is odd to suggest that Webb-Kenyon reaches further than the Amendment.

[2] Our approach does not read Section 2 of the Twenty-First Amendment off the books, as respondents imply. By constitutionalizing the Webb-Kenyon rule at a time when the direct-shipment loophole was thought to be required by the Commerce Clause, Section 2 assures states the right to stay (or become) dry, or to impose whatever less-restrictive limits they would like on the use or handling of alcohol. But those limits must be even-handed: "State

2. Respondents nonetheless insist that their discrimination is permissible because it is part of a "three-tier system" under which most liquor sold in-state must pass from a producer to a licensed wholesaler and then to a licensed retailer. *Granholm* indicated that three-tier systems are "unquestionably legitimate" (544 U.S. at 489) and, respondents assert, discrimination against out-of-state entities is inherent in such systems. Virginia Opp. 14-16; VWWA Opp. 11. But the idea that states are free to discriminate so long as they use a three-tier system – although not otherwise – rests on an illogical rule that is wholly inconsistent with the theory of *Granholm* and the policy of the Twenty-First Amendment.

We agree that states may make use of *nondiscriminatory* three-tier systems, which is just what the Court said in *Granholm*: states may "assume direct control of liquor distribution" or funnel in-state sales "through [a] three-tier system" (544 U.S. at 488), so long as "they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489.[3] But Virginia's view that a *discriminatory* three-tier system is constitutional has to rest on the notion that the Twenty-First Amendment gives states complete control over everything that happens to every drop of alcohol that crosses the state's

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policies are protected under the Twenty-First Amendment when they treat liquor produced out of state *the same as its domestic equivalents*." *Granholm*, 544 U.S. at 489 (emphasis added). States thus are free to limit the transportation of alcohol for personal use, but if they do those limits must apply equally to alcohol acquired in- and out-of-state.

[3] Respondents misstate our argument. We do not contend "that restrictions on the importation of alcohol for personal use are unconstitutional." Virginia Opp. 2. States may ban or limit the importation of alcohol for personal use, as long as the same limits apply to the *in-state* purchase or transportation of alcohol. For example, the Virginia legislature could resolve the constitutional problems here by imposing equal transportation limits on personal-use alcohol bought in-state.

border. That concept was endorsed by the *Granholm* dissent; logically and historically, the theory of permissible discrimination can have no other basis. But that concept of the Amendment was flatly *rejected* by the holding of *Granholm*. Respondents' position must be that *Granholm* says states may *not* discriminate against out-of-state wine that is shipped into the jurisdiction by a winery, but *may* discriminate against out-of-state wine that is carried into the jurisdiction by the ultimate consumer. Nothing in the logic of *Granholm* or the history of the Twenty-First Amendment supports this sort of bizarre distinction. In addition, such an approach is completely at odds with the Commerce Clause doctrine embraced by *Granholm*, which has "rightly concluded that the imposition of a differential burden on any part of the stream of commerce from wholesaler to retailer to consumer is invalid." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 168, 202 (1994) (collecting cases).

3. The issue presented here is one of general importance. The Fourth Circuit's holding leaves *Granholm* standing for an untenable and internally inconsistent rule, gutting *Granholm*'s broad nondiscrimination principle. It leaves the law in a state of considerable confusion at a time when (as respondents themselves acknowledge, see VWWA Opp. 9)) many state legislatures are revisiting their systems of alcohol regulation. And it leaves standing a blatantly discriminatory rule of the sort that, in all other contexts, has been understood to "interfere with the project of our federal Union." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 595 (1997). As we show in the petition, the Twenty-First Amendment was not intended to legitimate a system that carries with it precisely the evils the dormant Commerce Clause was intended to prevent.

In fact, Virginia acknowledges that, even absent a conflict in the lower courts regarding the constitutionality of identical state statutes, this Court "does grant review if there are important questions [in the case] concerning the States'

sovereign choices." Virginia Opp. 21. And Virginia plainly is wrong in asserting that this is so only when the lower court "invalidated a state statute or constitutional provision." *Ibid.* To the contrary, in the Commerce Clause context the Court repeatedly has reviewed and set aside lower court decisions *upholding* discriminatory state statutes, even in the absence of conflicting lower court decisions invalidating identical laws. See, *e.g.*, *Associated Indus. of Missouri* v. *Lohman*, 511 U.S. 641 (1994); *Chem. Waste Mgmt.* v. *Hunt*, 504 U.S. 334, 339 (1992) ("Because of the importance of the federal question and the likelihood that it had been decided in a way conflicting with applicable decisions of this Court, this Court's Rule 10.1(c), we granted certiorari * * *"); *Fort Gratiot Sanitary Landfill, Inc.* v. *Mich. Dept. of Natural Res.*, 504 U.S. 353, 358 (1992) ("We granted certiorari * * * because of concern that the decision below was inconsistent with *Philadelphia* v. *New Jersey* and now reverse."). Given this Court's "'duty'" to review state statutes that "'work discrimination against interstate commerce'" (*West Lynn Creamery*, 512 U.S. at 201 (citation omitted)), further review of the Fourth Circuit's decision is warranted.[4]

B. The Market Participant Exception Does Not Justify The ABC Stores Restriction

The briefs in opposition also confirm the petition's central points regarding Virginia's ABC stores restriction. Virginia makes no attempt to deny that the combination of its

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[4] It is immaterial that "there is no factual record on the Constitutionality of the Personal Import [Limit]." Virginia Opp. 21-22. No such record is necessary in considering a claim of *facial* discrimination. See, *e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 575-76 ("It is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce."). In fact, it is *Virginia*'s burden to advance facts justifying its discrimination (see *Granholm*, 544 U.S. at 490-493), a burden it has not even attempted to shoulder.

regulatory monopoly over the sale of liquor and the Virginia "farm wine" requirement for the stocking of ABC stores gives its domestic wines a material advantage over out-of-state competitors in the marketplace. The State also candidly concedes that our challenge to the constitutionality of the ABC stores restriction finds support in "passages" in some of this Court's decisions, which "implicitly recognize the possibility of the Petitioners' theory." Virginia Opp. 20. And VWWA (at Opp. 9 & n.5) acknowledges that decisions of the lower courts reflect confusion about the nature of the market-participant doctrine. Given all this, what respondents fail to do is offer any reason for this Court to deny review.

1. Virginia makes no serious attempt to defend the constitutionality of the ABC stores restriction. As we showed in the petition, the market-participant exception comes into play only when the State is "burdened with the same restrictions imposed on private market participants." *Reeves, Inc.* v. *State*, 447 U.S. 429, 439 (1980). See Pet. 23-24 (citing cases). The Court accordingly has invalidated state laws that leverage state regulatory authority into a market advantage (see, *e.g.*, *S.- Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 98 (1984)) and, even when finding the market-participant exception to apply, has clearly distinguished between circumstances where the State acts "in the more general capacity of a market participant" from those where it acts in its "distinctive governmental capacity" as a regulator. *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 277 (1988). Virginia entirely disregards these decisions and makes no effort to explain how the ABC stores restriction – which requires Virginia consumers to purchase Virginia wine if they want to buy wine and liquor simultaneously – does not involve state action in its regulatory and "distinctive governmental capacity."

In fact, the hypothetical examples Virginia uses in defense of the ABC stores restriction demonstrate that the State misunderstands the constitutional rule. Virginia equates the

ABC stores restriction with a state's choosing to stock certain products in vending machines at highway rest areas or choosing to sell a particular brand of soda at a state university cafeteria. Virginia Opp. 19. But these examples omit the crucial, unconstitutional aspect of the real Virginia scheme: they do not regulate private competitors in a manner that gives the State an advantage in the marketplace. A more apt analogy would be a regime in which Virginia gave itself a monopoly on gasoline sold within fifty miles of interstate highways and then chose to sell only Virginia products in the state-owned service station rest areas. By requiring travelers to stop at Virginia's rest areas to purchase gasoline, the State necessarily would create more demand for other Virginia products because travelers generally would want to make only a single stop for fuel and snacks. Such a market regulation surely would violate the Commerce Clause. But Virginia leverages its hard liquor monopoly much the same way.[5]

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[5] Virginia itself proposes an exception to the market-participant doctrine, which (according to the State) "should be limited to those situations where the government is using its regulatory power and market participant power to make itself the exclusive retailer and to restrict consumer choice to in-state products." Virginia Opp. 20. Yet that is precisely what Virginia does with its ABC stores restriction because the State is the *exclusive* retailer in the wine-and-liquor market. It is immaterial that there are many private wine retailers in Virginia because there is only one wine-and-liquor retailer – the State. For its part, VWWA goes astray in arguing (at Opp. 16-17) that the market-participant exception should apply here because Virginia consumers who seek to purchase liquor, wine, *and beer* must go to more than one store. That not *all* consumers of alcohol in Virginia would have the convenience of one-stop shopping if the Virginia farm wine limit were lifted (because some want to buy beer as well wine and liquor) hardly means that Virginia is permitted to give itself an unfair advantage in the wine-and-liquor market.

2. Nothing in the record is an impediment to review of the market-participant issue here. In fact, respondents take inconsistent positions on the state of the record. VWWA says (at Opp. 17) that the court of appeals made "factual findings" and "found no record support for the claim that Virginia conferred an advantage on its in-state wineries through the ABC stores provision." The State, in contrast, acknowledges that the district court found the provision to *have* a discriminatory impact but insists that subsequent changes in *other* provisions of Virginia law somehow call those findings into question. Virginia Opp. 22.

These makeweight arguments are insubstantial. There can be no doubt that the discriminatory ABC stores restriction confers a competitive advantage on Virginia wine, and the State does not contend otherwise; that is, after all, the whole point of the restriction. Nor did the Fourth Circuit make any contrary factual finding. It concluded only that the existence of private wine stores in the State means that consumers are able to obtain out-of-state wines if they are willing to make the effort (Pet. App. 30a-31a), which is quite a different matter and says nothing about the competitive advantage provided to Virginia wines. The court of appeals' ultimate holding was the purely legal one that Virginia "cannot be barred from making business choices that favor local interests on the ground that some consumers might be inconvenienced." *Id.* at 30a; see *id.* at 31a ("These are matters of convenience, not monopoly power."). That conclusion raises the legal question presented here: whether use of state regulatory authority to create a practical advantage for the State's products is inconsistent with the Commerce Clause.

It may be added that factual development is not needed to prove what is not in dispute. No one doubts that the ABC stores restriction advantages Virginia wine. Virginia itself does not deny it. The question is whether such an advantage is permissible under the market-participant exception. This is a legal question that can be resolved without additional fac-

tual development; when a state law is facially discriminatory, it is settled that the extent of the advantage to in-state interests is irrelevant to the question whether the State violates the Commerce Clause. *Limbach*, 486 U.S. at 276 ("[W]here discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."). See Pet. 27 n.11.

3. The issue here warrants review. Courts of appeals and commentators have recognized that the law relating to the market-participant doctrine is confused. The State concedes that, at a minimum, the Fourth Circuit's holding is in tension with language in this Court's opinions. That holding invites states to leverage their regulatory authority into a market advantage. And the Virginia regime at issue here gives domestic businesses a manifest competitive advantage over out-of-state wine producers. As we note above, the Court repeatedly has granted review in such circumstances even absent a clear conflict in the lower courts regarding the constitutionality of identical state laws. It should do so here as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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